

1 counsel to assist him. An evidentiary hearing was conducted and the state district court denied relief.
2 On appeal of this denial, petitioner raised five assertions of ineffective assistance of trial counsel.
3 The Nevada Supreme Court affirmed the lower court's decision. On September 3, 2009, with the
4 assistance of counsel petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §
5 2254 in this action. Respondents have moved to dismiss the petition, contending that three subparts
6 of ground one are unexhausted. Petitioner argues the motion is without merit as he has presented to
7 this court the same claims he presented to the Nevada Supreme Court - ineffective assistance of
8 counsel based on counsel's failure to "conduct an adequate pretrial investigation" and because he
9 "made critical trial errors." Opposition to Motion to Dismiss (docket #15), pp. 3-4.

10 **II. Legal Standard**

11 A federal court will not grant a state prisoner's petition for habeas relief until the
12 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S.
13 509 (1982); 28 U.S.C. § 2254(b).¹ State remedies have not been exhausted unless the claim has been
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15 ¹ 28 U.S.C. § 2254(b) states, in pertinent part:

16 An application for a writ of habeas corpus on behalf of a person in
17 custody pursuant to the judgment of a State court shall not be granted
18 unless it appears that: (A) the applicant has exhausted the remedies
19 available in the courts of the State; or (B)(i) there is an absence of
20 available state corrective process; or (ii) circumstances exist that render
21 such process ineffective to protect the rights of the applicant.
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25 (c) An applicant shall not be deemed to have exhausted the remedies
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1 fairly presented to the state courts. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). To fairly
 2 present a federal claim to the state court, the petitioner must alert the court to the fact that he asserts
 3 a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999),
 4 *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66. The petitioner must make
 5 the federal nature of the claim “explicit either by citing federal law or the decisions of the federal
 6 courts.” *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended*, 247 F.3d 904 (9th Cir.
 7 2001).

8 The mere similarity of claims of state and federal error is insufficient to establish
 9 exhaustion. *Hiivala*, 195 F.3d at 1106, *citing Duncan*, 513 U.S. at 366; *see also Lyons*, 232 F.3d at
 10 668-69; *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). “[G]eneral appeals to broad
 11 constitutional principles, such as due process, equal protection, and the right to a fair trial, are
 12 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106, *citing Gray v. Netherland*, 518 U.S.
 13 152, 162-63 (1996); *see also Shumway*, 223 F.3d at 987. However, while federal-state comity
 14 concerns preclude this court’s consideration of “ ‘new evidence that places [a] claim in a
 15 significantly different posture’ ” on habeas review, federal courts in this circuit have previously
 16 considered additional evidence that does not alter the gravamen of the petitioner’s claim. *Luna v.*
 17 *Cambra* 306 F.3d 954, 965 (C.A.9 (Cal.),2002) as amended by 311 F.3d 928 (9th Cir. 2002) citing
 18 *Brown v. Myers*, 137 F.3d 1154, 1157 n. 3 (9th Cir. 1998) (alteration in original) (quoting *Nevius v.*
 19 *Sumner*, 852 F.2d 463, 470 (9th Cir.1988)).

20 **III. Discussion**

21 Respondents contend that petitioner has failed to exhaust parts of ground one of the
 22 petition. They specifically assert that (1) petitioner did not “argue to the Nevada Supreme Court that

23 available in the courts of the State, within the meaning of this section, if
 24 he has the right under the law of the State to raise, by any available
 25 procedure, the question presented.
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1 trial counsel was ineffective for presenting expert testimony regarding a two-gun battle;” (2) that
2 although petitioner argued in state court that counsel failed to interview and solicit testimony from
3 the physicians who treated him after he absconded to Wisconsin,” petitioner did not alleges that
4 counsel failed “to inquire as to whether medical treatment had been received” by petitioner, and (3),
5 while acknowledging that petitioner did contend in the state court that he received ineffective
6 assistance by counsel for “failing to hire a forensic pathologist to analyze evidence of gunshot
7 residue, petitioner never complained that counsel was ineffective for “failing to hire a forensic
8 pathologist or crime scene investigator knowledgeable about testing for gunshot residue.”

9 Having reviewed the opening, responding, and reply briefs presented to the Nevada
10 Supreme Court on appeal of denial of the post-conviction petition for writ of habeas corpus, the
11 court finds that the differences between the claims raised and argued before the Nevada Supreme
12 Court and the claims raised and argued here are in no way substantive and are insufficient to place
13 the claim of ineffective assistance of counsel at trial in a significantly different light. The facts
14 presented to this court were all presented for the Nevada Supreme Court’s review. Simple editing or
15 reorganization of the arguments are of no moment in considerations of exhaustion. The interests of
16 comity have been served and the petition shall proceed before this court on its merits.

17 Furthermore, the court finds respondents’ motion to dismiss plainly and painfully
18 disingenuous. The minuscule and inconsequential differences identified between the state post-
19 conviction appeal and this federal petition do not warrant the expenditure of resources this motion
20 has required. Respondents are cautioned to consider such arguments carefully in the future.

21 **IT IS THEREFORE ORDERED** that the motion to permit late filing (docket #14)
22 is **GRANTED**.

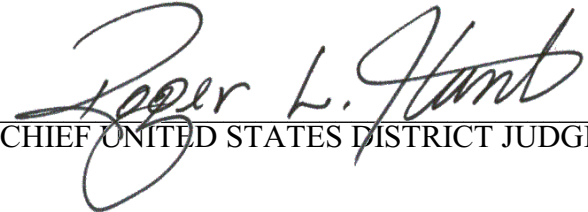
23 **IT IS FURTHER ORDERED** that the motion to dismiss (docket #6) is **DENIED**.

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1 **IT IS FURTHER ORDERED** that the respondents shall have thirty (30) days to file
2 their answer to the claims presented in this petition. Thereafter, petitioner shall have thirty (30) days
3 to reply.

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5 Dated this 8th day of July, 2010.

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7 
8 CHIEF UNITED STATES DISTRICT JUDGE